90-1858

RECORD NO.

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

JAMES E. BAYLOR, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred in failing to remand the case of the Petitioner, a white defendant, to the United States District Court for the Eastern District of Virginia ("District Court") based on a Batson violation when the Fourth Circuit, in the same appeal proceeding, remanded the cases of Petitioner's two Co-Defendants, who are black, to the District Court based on a Batson violation?

PARTIES TO THE PROCEEDINGS

The parties in the District Court and in the Fourth Circuit were the Petitioner, James E. Baylor, Jr., his Co-Defendants, Morgan A. Joe, Sr. ("Joe") and Alton L. Skeeter ("Skeeter"), and the Respondent, the United States of America ("Government").

TABLE OF CONTENTS

	Page
Question Presented for Review.	2
Parties to the Proceedings	3
Reference to the Opinion Delivered in the Court Below	6
Jurisdictional Grounds	6
Constitutional Provision Involved in this Case	7
Statement of the Case.	7
Reasons Relied Upon for Allowance of the Writ.	14

TABLE OF AUTHORITIES

	Page
Batson v. Kentucky, 476 U.S. 79 106 S.Ct. 1712 (1986)	10-17
Powers v. Ohio, 111 S.Ct. 1364 (1991).	12-14, 16
United States v. Joe, 928 F.2d 99 (4th Cir. 1991)	6,15,16

REFERENCE TO THE OPINION DELIVERED IN THE COURT BELOW

The only reported decision or opinion in existence with regard to this case is the opinion of the Fourth Circuit, affirming the Petitioner's conviction, and reversing and remanding the cases of Petitioner's Co-Defendants, Joe and Skeeter, to the District Court, which is reported as United States v. Joe, 928 F.2d 99 (4th Cir. 1991) [a copy of this opinion is included in the Appendix, Pages A-39 - A-59].

JURISDICTIONAL GROUNDS

The District Court entered judgment against Petitioner on January 18, 1990. (Appendix, Pages A-4 - A-13).

This judgment was timely appealed to the Fourth Circuit. On March 4, 1991, the Fourth Circuit, by opinion, denied the

Petitioner's grounds for appeal and affirmed the judgment of the United States District Court.

Jurisdiction is conferred upon this Court to review the decision of the Fourth Circuit and the judgment of the District Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fifth Amendment of the United States Constitution which provides in pertinent part: No person shall be. . . deprived of life, liberty, or property, without due process of law. . ..

STATEMENT OF THE CASE

Petitioner, Joe and Skeeter (jointly referred to as "Defendants") were tried on an indictment in the Eastern District of Virginia which charged Petitioner with 19 counts, Joe

with 44 counts, and Skeeter with 22 counts. The charges against Petitioner which were submitted to the jury were: Conspiracy, Obstruction of Justice, Bank Fraud, Kickback Payments (four counts), False Statements (two counts), and False United States Corporate Tax Returns (two counts).

The jury trial began on October 30, 1989. At the commencement of the trial, the names of 30 prospective jurors, 19 who are white and 11 who are black were drawn by the Clerk from a larger jury pool and placed on a list. The District Court granted the three defendants, jointly, 12 peremptory challenges and granted the Government six peremptory challenges. The Government and Defendants alternated striking the jurors' names from the list with the Defendants striking two jurors at a time and the Government striking one juror, respectively. The Government and the

Defendants were each given two additional strikes, respectively, to select four alternate jurors from a list of eight names.

Of the six peremptory strikes which the Government was permitted to exercise, five were exercised to strike blacks. The Government's other strike was used to remove from the panel a prospective white juror who the Government had unsuccessfully challenged for cause. In addition, the Government used one of its two peremptory challenges to the alternate panel against a black who would have been the first alternate to serve. Six black jurors (all women) were initially seated on the petit jury, however, five blacks and seven whites comprised the jury which deliberated and returned its verdicts of guilty against the three defendants.

Before the jury was sworn and before the trial commenced, the Defendants moved to

dismiss the jury on the basis that the Government exercised its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The District Court summarily denied the motion. The following morning, the Government met with a court reporter, out of the presence of the Court and the Defendants over Defendants' objection, and dictated to the court reporter its reasons for striking the six black jurors. The Court sealed the record containing the reasons articulated by the Government without reviewing the proffered explanations.

At the conclusion of the trial, the Defendants renewed their Batson motion. At a post-trial hearing the District Court denied the Defendants' Batson motion without making a finding whether the reasons, articulated by the Government concerning the striking of the

black jurors, were racially neutral (App. at A-3). On January 18, 1990, the District Court entered final judgment in accordance with the jury's verdict and sentenced the Petitioner.

The Petitioner, Joe, and Skeeter, appealed their respective convictions to the Fourth Circuit. The jurisdiction of the Fourth Circuit was invoked pursuant to 28 U.S.C. § 1291. The Defendants filed a joint brief and specifically raised as an issue for review "Whether Joe, Skeeter and [Petitioner] are entitled to a new trial based on principles of Batson v. Kentucky." (See Appendix, Page A-16).[1]

---

[1] In addition, Petitioner specifically joined in Argument I (Batson argument) of the joint brief (See Appendix, Page A-21 - A-22) and specifically adopted in his Separate Brief, which supplemented the joint brief, the Batson argument set forth in the joint brief (See Appendix Page A-41).

The Fourth Circuit, remanded the cases of Joe and Skeeter to the District Court with instructions to conduct a Batson violation analysis, but affirmed the conviction of Petitioner notwithstanding the fact that he also raised the Batson issue in his appeal.[2]

The time for filing a Petition for Rehearing in the Fourth Circuit ended on March 18, 1991. On April 1, 1991 this Court decided Powers v. Ohio, 111 S.Ct. 1364 (1991) and held as a matter of first impression that a defendant has standing to raise a race-based exclusion of jurors through peremptory challenges whether or not the defendant and the excluded jurors are of the same race.

---

[2]It is assumed, based on the Fourth Circuit's emphasis in its opinion, that Joe and Skeeter are black and Petitioner is white, that the Fourth Circuit did not believe that Petitioner had standing, based on his race, to raise a Batson violation. See United States v. Joe, 928 F.2d 99, 101 (4th Cir. 1991) (See Appendix at Page A-45 - A-46).

Because the Powers opinion was not released until after Petitioner's time for petitioning the Fourth Circuit for a rehearing had passed, Petitioner did not have the opportunity to offer the Powers case to the Fourth Circuit in support for his Batson argument.

The District Court scheduled a hearing for May 16, 1991, pursuant to the opinion of the Fourth Circuit, requiring it on remand to make findings on whether the Government had given sufficient race neutral reasons for the striking of the black jurors. On May 15, 1991 Petitioner filed in the District Court a motion requesting that he be allowed to participate in the May 16, 1991 hearing.

On May 16, 1991 the District Court granted Petitioner's motion and allowed him to participate in the hearing. The District Court took the case under advisement and to date, the District Court has not entered an

order with respect to the May 16, 1991 hearing.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Fourth Circuit Erred in Failing to Remand the Case of Petitioner, Who is White, to the District Court Based on a Batson Violation When the Fourth Circuit Remanded in the Same Appeal Proceeding the Cases of Petitioner's Two Co-Defendants, Who are Black, Based on a Batson Violation.

On April 1, 1991, this Court decided Powers v. Ohio, 111 S.Ct. 1364 (1991) and held, as a matter of first impression, that a white defendant in a criminal case can raise the third-party equal protection claims of black jurors precluded by the prosecution, through peremptory challenges, from serving on the petit jury solely on account of their race. In the case below, the Fourth Circuit found a Batson violation. The Fourth Circuit held that by allowing the Government to state its reasons outside the presence of the

District Court for using six of its eight peremptory challenges to strike black jurors, the District Court was deprived of the opportunity to evaluate the credibility of the Government's representative when the representative gave his reasons for exercising peremptory challenges to strike black jurors. Joe, 928 F.2d at 103. (See copy of relevant excerpts of opinion at Appendix, Page A-55 - A-57). The Fourth Circuit also criticized the District Court for waiting until after trial to consider the Batson objections recognizing that the District Court was no longer in a position after trial to cure any violation which occurred during the jury selection process. Id. The Fourth Circuit concluded "The parties are not present before this court to permit us to judge their credibility or to adequately follow-up with our inquiry to further explore the validity of

the various arguments the parties may advance. Consequently, we are compelled to remand the cases of Joe and Skeeter [black defendants] to the district court with instructions to conduct a Batson violation analysis." Joe, 928 F.2d at 104 (emphasis added). (Relevant excerpts of cited opinion attached in Appendix, Pages A-58 - A-59).

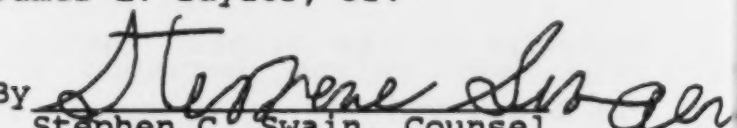
The Fourth Circuit did not remand the case of Petitioner, who is white to the District Court although Petitioner raised and joined in the same Batson issue. It must be assumed the Fourth Circuit based on its emphasis in its opinion that Joe and Skeeter are black and Baylor is white, did not believe Petitioner had standing, based on his race, to raise a Batson violation.

Because Petitioner properly raised the Batson issue on appeal, because this Court has determined in Powers v. Ohio that a white

defendant has standing to raise the third-party equal protection claims of black jurors excluded from serving on the petit jury by the prosecution because of their race, and because the Fourth Circuit has remanded the cases of the Petitioner's Co-Defendants to the District Court to make factual findings concerning possible Batson violations, this Court should grant James E. Baylor, Jr.'s Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED,

James E. Baylor, Jr.

By 
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SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES E. BAYLOR, JR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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APPENDIX TABLE OF CONTENTS

	Page
Excerpts of Transcript Proceedings. .	A-1
Judgment Order.	A-4
Excerpts of Brief of Appellants Joe, Skeeter and Baylor filed in the Fourth Circuit Court of Appeals.	A-14
Excerpts of Baylor's Separate Brief filed in the Fourth Circuit Court of Appeals	A-39
Published Opinion of the Fourth Circuit Court of Appeals, United States v. Joe, 928 F.2d 99 (4th Cir. 1991).	A-42
Mandate of Fourth Circuit Court of Appeals	A-60

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA	)	CRIMINAL
V.	)	ACTION
MORGAN A. JOE, SR.	)	NO.89-67-N
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 18, 1990

Before:

HONORABLE WALTER E. HOFFMAN
Senior Judge

Tayloe Associates, Inc.
Registered Professional Reporters
Telephone: (804) 461-1984
Norfolk, Virginia

THE COURT: Mr. -- the difficulty is I can't remember when this comes up in sentencing Mr. Skeeter anything about this. You will have to repeat what you want to raise when Mr. Skeeter comes before the Court. I can't -- I can't take statements or evidence in his absence.

MR. SHUTTLEWORTH: If Your Honor please, --

THE COURT: Well, I just rule you're out of order.

MR. SHUTTLEWORTH: Okay.

THE COURT: Have a seat. You may raise the question at the appropriate time but not now.

MR. SHUTTLEWORTH: All right.

THE COURT: I'm not going to get tied up with being accused of making a ruling that will affect Mr. Skeeter in his absence.

MR. SHUTTLEWORTH: Well --

MR. SEABOLT: Your Honor, if I may, just so the record is clear -- and maybe the Court was about to do this -- I think for the record purposes we ought to have a ruling on a factual level as to whether the government's reasons are sufficient under Batson.

THE COURT: I'm going to give you a ruling. I've already ruled yesterday, and I will now reiterate my ruling, that I think your position is frivolous. However, good luck to you on appeal.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA

V. JUDGMENT IN A CRIMINAL CASE

JAMES E. BAYLOR, JR. CASE NUMBER: CR. 89-67-N---03

Stephen C. Swain, Esq.,
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[ ] guilty [ ] nolo contendere as to count(s) _____, and

[ ] not guilty as to count(s)_____.

THERE WAS A:

[ ] finding [X] verdict of guilty as to count(s) 1, 6, 19, 36, 37, 40, 42, 43, 44, 68 & 69

THERE WAS A:

[ ] finding [ ] verdict of not guilty as to count(s) _____

_____

[ ] judgment of acquittal as to count(s) 2 and 3. The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

violation of Title 18 U.S.C. § 371 - Conspiracy re Kickbacks (re: T.41:52 & T.41:51 & 54); violation of Title 18 U.S.C. § 1503 - Obstruction of Justice; violation of Title 18 U.S.C. § 1344 - Bank Fraud; violation of Title 18 U.S.C. § 1001 & 2 - False Statements; violation of Title 41 U.S.C. § 51 & 54 - Cause Payment of Gratuities; violation of Title 26 U.S.C. § 7206(2) - Aid & Abet in preparation & presentation of false corporate tax returns.

IT IS THE JUDGMENT OF THIS COURT THAT;

AS TO COUNT 1: The defendant is hereby committed to the custody of that Attorney General or his duly authorized representative for imprisonment for a period of TWO (2) YEARS, unless sooner released by operation of law. The defendant shall pay a FINE in the amount of $5,000. Said Fine shall be paid in installments as directed by the Probation Office.

AS TO COUNT 6: The defendant is hereby committed to the custody of the Attorney General or his duly authorized representati[illegible] for imprisonment for a period of TWO Yrs, unless sooner released by operation of law. Sentence as to Count 6 shall run consecutively with sentence imposed in Count 1.

AS TO COUNT 19: The defendant is hereby committed to the custody of the Attorney General or his duly authorized representative for imprisonment for a period of ONE (1) YEAR,

unless sooner released by operation of law. Count 19 shall run consecutively with sentence imposed in Counts 1 and 6.

AS TO COUNTS 36 & 37: The defendant is hereby committed to the custody of the Attorney General or his duly authorized representative for imprisonment for a period of TWO (2) YEARS as to each count. Sentences as to Counts 36 and 37 shall run concurrently with each other and with Counts 1, 6 & 19.

AS TO COUNTS 40, 42, 43 & 44: The defendant is hereby committed to the custody of the Attorney General or his duly authorized representative for imprisonment for a period of TWO (2) YEARS as to each count. Said sentences shall run concurrently with each other and with sentences imposed in Counts 1, 6 & 19.

AS TO COUNTS 68 & 69: The defendant is hereby committed to the custody of the attorney

General or his duly authorized representative for imprisonment for a period of TWO (2) YEARS as to each count. Said sentences shall run concurrently with each other and with Counts 1, 6 & 19.

Said sentences are imposed pursuant to the provisions of Title 18 U.S.C. Section 4205(b)(2).

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $450.00 pursuant to Title 18, U.S.C. § 3013 for count(s) 1, 6, 19, 36, 37, 43, 44, 68 & 69 as follows: $50.00 as to each count shown. Special Assessments are to be paid immediately.

IT IS FURTHER ORDERED that counts 10, 11, 12, 13, 14 & 41 are DISMISSED.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and Recommends: the Attorney General and recommends:

The defendant is continued on his present bond and directed to report to designated institution on Friday, February 16, 1990 by 12:00 Noon. The Court recommends confinement at Petersburg Camp.

January 18, 1990
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Walter E. Hoffman, U.S. District Judge
Name and Title of Judicial Officer

January 18, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

_____

Defendant delivered on _____ to ____

_____ at _____

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By_____
Deputy Marshal

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NOS. 90-5005(L)
90-5006, 90-5022

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

MORGAN A. JOE, SR.,
JAMES E. BAYLOR, JR. and
ALTON L. SKEETER,
Defendants/Appellants.

BRIEF OF APPELLANTS

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FOR THE EASTERN DISTRICT OF VIRGINIA
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Joe, Skeeter, and Baylor are entitled to a new trial based on principles of Batson v. Kentucky;

ARGUMENT

I. THE DISTRICT COURT COMMITTED CLEAR ERROR IN REFUSING TO FIND THAT THE GOVERNMENT VIOLATED THE RULE OF BATSON V. KENTUCKY BY STRIKING SIX BLACK PROSPECTIVE JURORS DUE TO THEIR RACE.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), held that a prosecutor's use of peremptory challenges based on racial discrimination violates a defendant's right to equal protection under the laws. Once the defendant makes a prima facie case of discrimination, the burden shifts to the Government to "offer neutral explanations for challenging the jurors." United States v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989),

citing Batson, 106 S.Ct. at 1723.[1] In this case, the district court committed clear error

in rejecting Joe's and Skeeter's contention that the Government had not offered "neutral explanations" for any of the six strikes exercised against prospective black jurors.

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[1]Joe presented a prima facia case of a Batson violation, both in writing, App. 579-83, and orally, App. 622-47. However, since the government's explanations for its strikes are a part of the record, App. 588-600, the issue whether defendants presented a prima facie case is moot. See United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987); United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987); and United States v. Clemmons, 892 F.2d 1153, 1156 (3rd Cir. 1989) (once prosecutor attempts to explain a peremptory challenge, trial and reviewing courts should "look to the entire record to determine if discrimination is present").

A. Review of Jury Selection Procedure and Relevant Motions.

Before jury selection, the Government challenged white prospective juror George P. Bell for cause on the ground that he was a social acquaintance of Herman Valentine, President of SMA. App. 717-23. Because the challenge to Bell was unsuccessful, App. 723, the Government was forced to use one of its peremptory strikes against this white juror. Apart from Mr. Bell -- whom the Government had no apparent choice but to strike -- the Government used all five of its remaining peremptory strikes for the regular jury against black prospective jurors.[2] In

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[3]The Government's strikes to prospective regular jurors are shown on App. 577 in order as "G-1," "G-2," etc. Defendants' strikes are shown as "D-1," "D-2," etc. Strikes to alternate jurors are shown at App. 578. The race of the jurors is indicated on the Juror

addition, the Government then used one of its two peremptory challenges to the alternate panel against a black, Rosa Fitchett, who would have been the first alternate. App. 578, 267.

Based upon the Government's pattern of using six of its total of eight strikes against blacks, counsel for Joe urged the district court to examine the Government's required compliance with Batson principles. App. 731-33. The court refused. Id. The following morning, however, the Government voluntarily

provided under seal a set of explanations for striking the six black jurors. See App. 734, 588-600. Before opening statements, the court

---

Qualification Questionnaires. See App. 214-68.

denied a motion by Skeeter and Joe to discharge the jury, deferring all further consideration of the Batson issue until the conclusion of trial. App. 735-38.

At oral argument on post-trial motions on January 17, 1990, the court allowed defense counsel to examine the transcript of the Government's explanations. App. 646-47. Prior to sentencing the next day, Joe's counsel presented an analysis of the Government's statement of reasons for striking six blacks from the jury, App. 656-81, which analysis demonstrated that for practically every reason offered by the Government for striking a black juror, a white juror not stricken had the same or similar attributes -- sometimes to a greater degree.[3] Without any

[3]At his sentencing on March 1, 1990, Skeeter adopted in its entirety defendant Joe's Batson presentation. App. 681(A)-

analysis of the Government's explanations, the district court rejected the Batson challenge as "nitpick(ing)" and "frivolous." App. 672, 680.

B. The Government's Explanations for Striking Six Black Jurors Were Vague, Irrelevant to the Case, and Reflect Criteria Not applied to White Jurors.

Counsel's methodology in analyzing the government's strikes was to (1) expose reasons that failed to meet basic requirements of clarity, specificity, and relation to the case being tried and (2) demonstrate that the explanations were not "racially neutral" in that the criteria applied to prospective black jurors were substantially ignored in considering prospective white jurors. Counsel's focus on clarity, specificity, and relevance is taken directly from Batson. 106

681(E). Baylor also joins in the Batson argument.

S.Ct. at 1724, n. 20 (the Government's explanations for peremptory strikes against

members of the defendant's race must be "clear and reasonably specific," and "related to the case being tried"). The comparison of the stated attributes of stricken blacks with those of whites not stricken reflects a methodology endorsed by courts across the country as a means of uncovering racial discrimination in Batson challenges. Such comparisons enable defense counsel "to point out that the stated reasons were pretextual because others similarly situated were allowed to serve." United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987).[4]

[4] See also United States v. Wilson, 853 F.2d 606, 610 (8th Cir. 1988), aff'd on rehearing en bank, 884 F.2d 1121 (1989) ("What constitutes a neutral explanation is a question of

A summary of defense counsel's analysis of the Government's explanations, to which the

---

comparability. Essentially, one must compare the characteristics of the individual which prompted the Government's strike with the characteristics of those not struck by the Government."); Roman v. Abrams, 822 F.2d 214, 228 (2d. Cir. 1987), cert. denied, 109 S.Ct. 1311 (1989) (state prosecutor's reasons for striking white jurors were pretexts when "some non-white prospective jurors with similar connections [to law enforcement] went unchallenged by the State"); Floyd v. Florida, 511 So.2d 762, 765 (Fla. Dist. Ct. App. 1987) (disqualification of black juror for being a student while white student not challenged "is strong evidence" that state's explanation "was a subterfuge to avoid admitting discriminatory use of the peremptory challenge"); Garrett v. Morris, 815 F.2d 509, 514 (8th Cir.) cert. denied, 108 S.Ct. 233 (1987) ("The prosecutor's rationale -- the blacks' purported lack of education, background, and knowledge -- seems clearly pretextual in light of his decision not to strike white jurors who differed in no significant way."); Missouri v. Butler, 731 S.W.2d 265 (Mo. App. 1987) (trial court should determine whether similarly situated white jurors were struck on identical or comparable grounds

Government offered no response to the district court, is as follows:

1. Pamela Elliott was a black female, age 22. The Government gave four reasons for striking Ms. Elliott; (i) she was from Portsmouth, Virginia, Joe's place of residence; (ii) "[s]he is young"; (iii) she

dropped out of college; and (iv) she reluctantly admitted she was employed by a company that did business with SMA. See App. 595-96.

Concerning Ms. Elliott's residence, white juror Jeffrey L. Howell was also a resident of Portsmouth. Moreover, white juror Nancy Koble (alternate) listed her residence as Norfolk, the same residence as the white co-defendant Baylor. App. 251, Tr. 6977 (Baylor

residence). Yet the Government permitted both of these white jurors to serve. As for Ms. Elliott's age, there was no indication as to why a person 22 years of age would be unable to serve competently and impartially in this particular case. Indeed, the government permitted a comparably aged white juror, Mr. Howell (26 years old), to serve. App. 258.

The "education" test applied to Ms. Elliott was clearly a pretext for discrimination. The Government accepted five white jurors with less or comparable education, including jurors Koble (high school degree) (App. 457), Howell (two quarters of college) (App. 418), Grieves (one year of college) (App. 381-C), Brown (10th grade) (App. 306), and Copeland (7th grade) (App. 332).

Concerning Ms. Elliott's employment, the Government mischaracterized her statement that

she had once worked for an SMA vendor as an "admission" and thereby implied that her disclosure was not properly volunteered. App. 595. In fact, Ms. Elliott orally volunteered this information on voir dire when the entire venire was asked whether they had ever worked for any companies that had business dealings with SMA. App. 706-07.

2. Rosa Fitchett, a black female who would have been the first alternate juror, was struck for two stated reasons. The first was

that she was employed by the Navy Supply Center in Norfolk. App. 596. However, the Government did not strike three white jurors with comparable employment backgrounds: Mr. Howell, a current Navy civilian employee (App.

710-11), and Messrs. Grieves and Brown, both military retirees. App. 712-13.

The second group of reasons given by the Government was that Ms. Fitchett wore "exotic sunglasses throughout the time [the parties] were in court", sat on the side near the defendants, and cast "friendly" glances towards the defendants, App. 596-97. Obviously, Ms. Fitchett's sunglasses had not even the remotest bearing on the case being tried. Moreover, the very fact that she was wearing sunglasses made it physically impossible for the Government to have observed, as it asserted, that she was casting "friendly glances" towards the defendants, especially when she was seated away from the prosecutors on the "defendant's side" of the courtroom. As for her choice of seating, there was no indication that any juror was

aware when they arrived in court which side was the "defendant's side" or the "government's side."

3. John E. Hill, a black male, was struck for three stated reasons. The first reason was that he "seemed very eager to take part in the case." App. 597. "Eagerness", of course, cannot be measured, and in any event has no relation to this or any case, unless the Government believes that a black juror would be eager to serve so that he could vote to acquit a black defendant. See Batson, 106 S.Ct. at 1723 (proscribing challenges based on assumption that black jurors would be partial to black defendants because of shared race). The second reason was that Mr. Hill had read about the case in the newspaper. App. 597. However, white juror Townsend also responded affirmatively when the court inquired on voir

dire whether any juror had read anything about the case. App. 715. Both Hill and Townsend added they would not be affected by what they

read, App. 715-16, Tr. 138, yet the Government struck only Mr. Hill, the black prospective juror.

The Government's third explanation was that Mr. Hill's daughter worked for SMA. App. 598. Here, the Government's objection to Mr. Hill flatly contradicted its theory of the case, i.e., that SMA was one of the victims -- the "personal piggy bank" -- of the defendants, App. 740, Tr. 309. Logically, an interest in the well-being of SMA should have been a reason for the Government to favor a juror's service. Thus, the Government's stated

concern with Mr. Hill's connection to an interested party (SMA) was clearly a pretext.

4. Gus Jackson was a 37-year-old black male, struck for two purported reasons. The first reason was that he gave the Government an "angry look" and was "not articulate", App. 598. These vague characterizations surely do not meet Batson's requirement for clarity and specificity. The second reason was that he attended Norfolk State University, which was "closely associated with Mr. Herman Valentine as well as Alton Skeeter, both of whom worked at Norfolk State prior to going to work for SMA." App. 598. However, the Government did not strike white jurors Townsend, who attended the same college as defendant Baylor (Old Dominion University, Tr. 6977) or Moore, who had worked for Old Dominion as its book store

manager. App. 488, 495. College affiliation here is a mere pretext for discrimination.

5. Thermon Lawrence, a 71-year-old black male, was struck for several reasons, the first apparently being that he was "elderly." App. 599. Yet, the Government did not strike two white jurors of comparable age (Mr. Copeland, age 64 (App. 265) and Mr. Brown, age 60 (App. 256)). The second reason was that Mr. Lawrence lived in Suffolk, asserted by the Government to be the home of Alton Skeeter. App. 599. In fact, as the Government well knew, Mr. Skeeter's residence was Chesapeake, Tr. 6717, which was also the home city of white jurors Harger (App. 253), Brown (App. 256) and Townsend (App. 246), who were not struck by the Government. The third reason

was that Mr. Lawrence had some Navy affiliation (App. 599); however, as noted, the Government accepted jurors Howell and Grieves despite their Navy affiliations.

6. Fannie Perry, a 26-year-old black woman, was struck by the Government for two stated reasons. The first reason was that she had only an eleventh grade education, App. 599, yet this was more education that two white jurors not struck by the Government, Copeland and Brown. App. 332, 306. The second reason was that she received only a "three" on the government's evaluation scale. App. 599. The basis for her low score was never explained, but Ms. Perry apparently lost points for being a single parent, which of course had absolutely nothing to do with this case.

7. Roland H. Copeland, Jr., was a white male who served on the jury until he was excused for medical reasons in the fifth week of trial. See App. 9 (docket entry for November 27, 1989). Mr. Copeland was not struck by the Government, despite the fact

that he had admitted a lifelong friendship with the wife of white defendant Baylor. App. 714. That the Government allowed Copeland to serve belies its purported concern about a juror's connection to an interested party. It further exposes the Government's inconsistent, discriminatory approach to jury selection and the disingenuous nature of the Government's explanations.

C. The District Court's Rubber Stamp of the Government's Statements of Reasons for its Strikes is not Entitled to the Deference Normally Applied to Batson Rulings.

This Court has held that a district court's factual analysis of a Batson discrimination claim is entitled to "great deference" and "will not be disturbed by this court unless clearly erroneous." United States v. Grandison, 885 F.2d 143, 146 (4th Cir. 1989). In this case, however, not only did the district court fail to critically evaluate the Government's explanations, but it also rejected the basic thesis of Batson -- that the Government is prohibited from considering a person's race in any manner to eliminate him from consideration. App. 8-9.[5] When the

[5]Among the observations the district court made during the hearing was that Batson would permit the Government to consider a juror's race in evaluating the "intellect" of equally educated white and black jurors. App. 660-63.

district court avoids its duty to evaluate the prosecutor's explanations, deference to its unexplained conclusion is simply inappropriate. See United States v. Hughes, 880 F.2d 101, 103 (8th Cir. 1989) (entire record examined on appeal where court gave undue weight to fact that two blacks served on the jury and gave no views on other aspects of discrimination). The legal sufficiency of the Government's explanations is therefore a proper subject of de novo review by this Court.

Even if the district court's summary rejection of defendants' Batson claim is reviewed under a "clearly erroneous" standard, this Court should not hesitate to reverse if the record does not support a finding of no

discrimination. See United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989) (ruling held clearly erroneous where prosecution's reasons were "stereotypical racial reasons" for striking black potential juror). As summarized above, once allowed to examine the Government's sealed reasons, the defendants exposed numerous unrebutted examples of explanations that were vague, irrelevant, incredible and/or applied only to black jurors -- including residence, age, education, exposure to pretrial publicity and connection to an interested party -- all of which, singularly and in combination, are more than sufficient to leave "the definite and firm conviction"[6] that the district court's rubber

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[6] See Anderson v. Bessemer City, 105 S.Ct. 1504, 1511 (1985) (applying "clearly erroneous" standard in Title VII case).

stamp of the Government's explanation constitutes clear error, requiring a reversal of the convictions of Joe and Skeeter and a new trial.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORDS NOS. 9-5005(L)
90-5006, 90-5022

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

V.

MORGAN A. JOE, SR.,
JAMES E. BAYLOR, JR. and
ALTON L. SKEETER

Defendants/Appellants.

APPELLANT BAYLOR'S SEPARATE BRIEF SUPPLEMENTING THE APPELLANTS' JOINT BRIEF FILED ON BEHALF OF JOE, BAYLOR AND SKEETER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Counsel for Appellants:
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STATEMENT OF THE ISSUES

I. Whether the variance between the single conspiracy charged in the indictment and the Government's proof of multiple conspiracies substantially prejudiced Baylor entitling Baylor to a new, separate trial on all counts. (Variance issue addressed in Argument II in Appellants' Joint Brief ("Joint Brief"));

II. Whether the evidence was sufficient to convict Baylor of conspiracy;

III. Whether the evidence was sufficient to convict Baylor of obstruction of justice;

IV. Whether the evidence was sufficient to convict Baylor of false statements;

V. Whether the evidence was sufficient to convict Baylor of the false corporate income tax return counts.

STANDARDS OF REVIEW

The standards of review which apply to the issues addressed in this Brief are set forth in Joint Brief.

STATEMENT OF THE CASE

Baylor adopts for his Separate Brief the "Statement of the Case" as set forth in Joint Brief.

ARGUMENTS

Baylor adopts the arguments set forth in Joint Brief (I, II, III, IV, IX, X) and those arguments are incorporated by reference herein as if fully set forth in this Separate Brief. In addition, Baylor makes the following arguments which are unique to him:

UNITED STATES of America,
Plaintiff-Appellee,

v.

Morgan A. JOE, Sr.,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

James E. BAYLOR, Jr.,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alton L. SKEETER,
Defendant-Appellant.

Nos. 90-5005, 90-5006 and 90-5022.

United States Court of Appeals,
Fourth Circuit.
Argued Oct. 2, 1990.

Decided March 4, 1991.

Robert Dale Seabolt, Mays & Valentine, Richmond, Va., Frederick Thomas Stant, Jr., Clark & Stant, P.C., Virginia Beach, Virginia, argued, for defendants-appellants; Wayne Lustig, Edward E. Scher, Mays & Valentine, Richmond, Va., on brief, for defendant-appellant Joe; Stephen C. Swain, S. Geoffrey Glick, Clark & Stant, P.C., Virginia Beach, Va., on brief, for defendant-appellant Baylor; Thomas B. Shuttleworth, Judith M. Cofield, Shuttleworth, Ruloff, Giordano & Kahle, P.C., Virginia Beach, Virginia, on brief, for defendant-appellant Skeeter.

Robert William Wiechering, Asst. U.S. Atty., Norfolk, Va., argued, for plaintiff-appellee; Henry E. Hudson, U.S. Atty., James A. Metcalfe, Asst. U.S. Atty., Norfolk, Va., C. Patrick Hogeboom, III, Gordon Kromberg, U.S.

Dept. of Justice, Washington, D.C., on brief, for plaintiff-appellee.

Before CHAPMAN and WILKINS, Circuit Judges, and STAMP, District Judge for the Northern District of West Virginia, sitting by designation.

WILKINS, Circuit Judge:

Morgan A. Joe, Sr., Alton L. Skeeter, and James E. Baylor, Jr. appeal their convictions resulting primarily from their participation in a kickback scheme involving United States Navy contracts.[1] The principal error assigned by defendants Joe and Skeeter is the alleged exercise by the government of its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476

[1]Since our decision does not turn on the numerous charges involved, we need not enumerate them in detail.

gU.S.79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We conclude that the district court failed to make the factual determinations necessary for this court to review the Batson issue and remand the cases of Joe and Skeeter to the district court for further proceedings. We affirm Baylor's conviction.

I.

Joe and Skeeter, who are black, were vice presidents of Systems Management American Corporation ("SMA"). The Small Business Administration awarded contracts to SMA on behalf of the Navy that included a provision that limited the amount of profit SMA could earn. In order to circumvent this contractual profit limitation, Joe and Skeeter conspired with subcontractors and suppliers who, in return for business from SMA, submitted in

invoices inflated by ten percent for the services and goods provided to SMA. SMA paid these invoices and thereby increased its overhead costs reimbursed by the government. The amount by which the invoices were inflated was then funnelled to Joe, Skeeter, and other coconspirators. Baylor, who is white, was vice president and general manager of Baylor Corporation, a subcontractor that transacted business with SMA, and was one of those involved in the kickback scheme.

Prior to voir dire, each juror completed a questionnaire requesting general background information. Additionally, each juror completed a Federal Court Juror Qualification Questionnaire that solicited the juror's age, address, race, and occupation. The court made this information available to the parties prior to empaneling the jury. During voir

dire, the district court and the attorneys questions the prospective jurors individually.

The attorneys agreed to follow a procedure different from that traditionally followed in criminal trials in selecting a jury. The clerk drew the names of thirty prospective jurors and placed them on a list. This number was sufficient to constitute a twelve-member panel after the defendants exercised their twelve peremptory challenges and the government exercised its six

peremptory strikes. The government and defendants alternated striking from the list. Of the thirty individuals chosen, nineteen were white and eleven were black. Four alternate jurors were selected in a similar fashion: the clerk drew eight names at random

and placed them on a list, and the government and defense each exercised two strikes.

In exercising its eight peremptory challenges, the government struck six black jurors including five from the panel and one alternate. The only white juror the government struck from the panel was George Bell, a prospective juror whom the government had unsuccessfully challenged for cause. Six black jurors initially were seated on the petit jury. Several jurors seated were excused during the course of the trial and replaced by alternates. The jury that ultimately deliberated and returned its verdicts of guilty included five black members.

Prior to the jury being sworn and the trial commencing, defendants moved to dismiss the jury on the basis that the government

exercised its peremptory strikes in a racially discriminatory manner. The district court refused to hold a hearing and summarily denied the motion. The court required, however, that the government meet with a court reporter the day after the jury was selected, out of the presence of the court and defendants, and dictate to the court reporter its reasons for striking the six black jurors. Without reviewing the proffered explanations, the court sealed the record containing the reasons submitted by the government.

At the conclusion of a seven-week trial, defendants renewed their Batson motion. They requested that the trial court address the question of whether they had presented a prima facie case for a Batson violation and, if so, review the reasons articulated by the government to determine if the explanations

were racially neutral. The trial court did not rule on whether the events during voir dire constituted a prima facie case under Batson or whether the reasons articulated by the government were racially neutral. Despite its resistance to addressing this issue, the district court opened the sealed record, permitted defendants to review the enclosed explanations, and allowed the parties to present their arguments for the record. The court then affirmed its earlier denial of defendants' motion apparently on the basis that since black jurors were seated and participated on the jury no Batson violation could occur.

II.

[1-3] The exercise of peremptory challenges by the government in a racially discriminatory manner violates a defendant's right to equal

protection. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). A defendant may establish a prima facie case under Batson by showing that "he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Id. at 96, 106 S.Ct. at 1723 (citation omitted). A defendant may rely upon the fact that the nature of peremptory strikes permits those who are inclined to discriminate to do so. A defendant must show facts sufficient to raise an inference of intent by the government to discriminate based on all of the relevant circumstances. Id., United States v. Grandison, 885 F.2d 143, 146 (4th Cir. 1989), cert. denied, ---U.S.---, 110 S.Ct. 2178, 109 L.Ed.2d 507 (1990). Although the presence of

members of a defendant's race on a jury may weigh against a finding of discrimination, a defendant is not automatically foreclosed from establishing a prima facie case of discrimination under Batson even when members of the defendant's racial group were seated. Grandison, 885 S.2d at 147.

[4] If a defendant presents a prima facie case of discrimination, the burden shifts to the government to come forward with a racially neutral explanation for the use of its strikes. Id. at 146. To satisfy this requirement, the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanations pretextual. See United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989).

[5] The district court erred in ruling that a Batson violation did not occur since members of the defendants' racial group were seated on the jury. As this court noted in Lane, "striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." Id. at 105 (emphasis added). Thus, while the fact that black jurors were seated is entitled to substantial consideration, it is not dispositive of this issue and does not preclude a finding that defendants established a prima facie violation of Batson.

[6,7] When determining whether a prima facie case of discrimination has been shown, the

district court may consider the proportion of black jurors stricken compared with the composition of the venire. See Batson, 476 U.S. at 97, 106 S.Ct. at 1723 ("a 'pattern' of strikes against black jurors...might give rise to an inference of discrimination"). The district court may also consider any questions or remarks made by the government during voir dire examination and in its exercise of challenges that tend to either support or negate an inference of discrimination. Id. The composition of the jury may be considered as part of the total relevant circumstances upon which a determination of discrimination in jury selection is made, but it is not dispositive of that issue. Grandison, 885 F.2d at 147.

A.

[8] The procedure followed by the trial court--permitting the government to make a record of its reasons for striking prospective black jurors outside the presence of the court, deferring consideration of the Batson issue until after trial, and failing to rule at each step of the required analysis--is not the preferable one. Allowing the government to state its reasons for striking outside the presence of the court deprived the district court of the opportunity to evaluate the credibility of the government's representative as reasons for exercising peremptory strikes were stated. Cf. Grandison, 885 F.2d at 146 (determination of intentional discrimination is a factual finding largely turning on evaluation of credibility; therefore, ruling by district court on this issue entitled to

great deference). Furthermore, by delaying a Batson hearing until after trial, a district court is no longer in a position to cure the violation during the jury selection process should a violation have occurred. The sole remedy remaining is the grant of a new trial, relief that requires an additional and unnecessary expenditure of judicial and litigant resources since a new trial could have been avoided by a timely decision. Additionally, the failure of the district court to rule at each step of the Batson analysis deprives this court of the benefit of its factual determinations and the reasons supporting its ultimate holding.

We caution that the favored method for a district court to use in evaluating a Batson challenge is initially to determine whether the defendant has shown a prima facie

violation when the issue is first raised. If the court finds a prima facie case of discrimination, it should require the government to articulate reasons for exercising its peremptory challenges to remove members of the defendant's racial group. The court should then determine if the reasons presented by the government are facially neutral. If so, the court should provide the defendant with the opportunity to establish pretext and then issue a specific ruling on each juror in question supported by its findings of fact and its rationale for the ruling.

B.

[9,10] Defendants urge us to conduct a review of the reasons offered by the government and determine in the first instance whether it exercised its strikes in a

discriminatory manner. They suggest that the record is sufficiently developed to permit us to decide the issue without remand. Generally this court will not reexamine the determination of a district court on the existence of a prima facie Batson violation and will proceed to consider the proffered explanations when the government has articulated its reasons for striking on the record. Lane, 866 F.2d at 105. The efficacy of this rule, however, stems from the

district court having already made findings upon the factual issues. We are not well positioned to conduct this important analysis with only a cold record and without the benefit of findings and supporting reasons of the trier of fact. The parties are not

present before this court to permit us to judge their credibility or to adequately follow-up with our inquiry to further explore the validity of the various arguments the parties may advance. Consequently, we are compelled to remand the cases of Joe and Skeeter to the district court with instructions to conduct a Batson violation analysis.

III.

Defendants raise numerous additional issues that they argue entitle them to a new trial or acquittal as a matter of law. We have carefully reviewed the remainder of these issues, many of which are frivolous, and find them to be without merit.

AFFIRMED IN PART AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
March 25, 1991

No. 90-5005
U.S. V. JOE

NO. 90-5006
U.S. V. BAYLOR

NO. 90-5022
U.S. V. SKEETER

M A N D A T E

The judgment of this court dated 3/4/91 takes effect today.

JOHN M. GREACEN
CLERK

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

(2)

No. 90-1858

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. BAYLOR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13

QUESTION PRESENTED

Whether the court of appeals should have remanded the case of petitioner, a white man, for a determination whether the prosecutor had discriminated against black jurors during jury selection, when the court remanded the cases of petitioners' black co-defendants for such a determination.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Batson v. *Kentucky*, 476 U.S. 79 (1986) 2, 3, 4, 5, 6, 7, 8, 9, 10
Clark v. *Newport News Shipbuilding & Dry Dock Co.*, No. 90-2361 (4th Cir. June 19, 1991) 7
Ford v. *Georgia*, 111 S. Ct. 850 (1990) 7
Government of the Virgin Islands v. *Forte*, 806 F.2d 73 (3d Cir. 1986) 7
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 6
Murray v. *Carrier*, 477 U.S. 478 (1986) 7
Powers v. *Ohio*, 111 S. Ct. 1364 (1991) 5, 6, 7, 9, 10
United States v. *Ratcliff*, 806 F.2d 1253 (5th Cir. 1986), cert. denied, 481 U.S. 1004 (1987) 7
United States v. *Young*, 470 U.S. 1 (1985) 8
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 8

Statutes and rules:

18 U.S.C. 371 1
18 U.S.C. 1001 2
18 U.S.C. 1344 2
18 U.S.C. 1503 2
26 U.S.C. 7206(2) 2
41 U.S.C. 51 2
41 U.S.C. 54 2
Fed. R. App. P. 28(i) 7
Fed. R. Crim. P. 52(b) 8

In the Supreme Court of the United States

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No. 90-1858

JAMES E. BAYLOR, JR., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A42-A59) is reported at 928 F.2d 99.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. The petition for a writ of certiorari was filed on June 3, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1); obstruction of justice, in violation of

18 U.S.C. 1503 (Count 6); bank fraud, in violation of 18 U.S.C. 1344 (Count 19); accepting or paying kickbacks, in violation of 41 U.S.C. 51 and 54 (Counts 40, 42-44); making false statements, in violation of 18 U.S.C. 1001 (Counts 36 and 37); and filing false corporate tax returns, in violation of 26 U.S.C. 7206(2) (Counts 68 and 69). He was sentenced to four years' imprisonment and a $5,000 fine. The court of appeals affirmed. Pet. App. A42-A59.

1. Petitioner, who is white, was jointly tried with co-defendants Morgan Joe and Alton Skeeter, who are black. During jury selection, the defendants were allotted 12 peremptory challenges and the government six. The parties agreed to select the jury by having the clerk draw the names of 30 potential jurors; the parties then exercised all of their peremptory challenges so that the remaining jurors constituted the 12-member panel. Of the 30 potential jurors chosen, 19 were white and 11 were black. Four alternate jurors were selected by a similar procedure: the clerk drew eight names at random, and the government and defense each exercised two peremptory strikes. Pet. App. A44, A46-A48.

In exercising its eight peremptory challenges, the government struck five black jurors from the panel and one black alternate. The government struck one white juror it had previously unsuccessfully challenged for cause, and one white alternate juror. The jury as empaneled included six black jurors. Pet. App. A48.[1]

Before the jury was sworn, defendants Joe and Skeeter moved to dismiss the jury on the ground that the government had exercised its peremptory challenges in a racially discriminatory manner, in

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[1] Several jurors originally seated on the panel were excused during the course of the trial and replaced by alternates. The jury that deliberated and returned the verdict included five black jurors. Pet. App. A48.

violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The district court summarily denied the motion, but it required that the government meet with the court reporter the following day, out of the presence of the court and the defendants, to dictate its reasons for striking the six black jurors. Thereafter, without reviewing the proffered explanations, the court sealed the record containing the government's reasons. Pet. App. A48-A49; 10/30/89 Tr. 239-240.

At the conclusion of the trial, defendants Joe and Skeeter renewed their motion. They claimed they had made out a prima facie case under *Batson* and urged the court to review the government's explanations to determine if the strikes were race-neutral. Pet. App. A49-A50. When the court inquired whether defense counsel wished to put the prosecutor on the stand testify about his reasons for striking the black jurors, defense counsel reiterated several times that there was no need for such a procedure, and that the determination could be made on the basis of the record as transcribed by the court reporter. 1/17/90 Tr. 28, 32, 34, 35-36; 1/18/90 Tr. 5.

The district court then read the transcript of the government's reasons for its peremptory strikes and ordered that the transcript be turned over to defense counsel. Before recessing the proceedings for defense counsel to examine the transcript, however, the court indicated that it believed there was no merit to the claim that the government had engaged in racial discrimination in exercising its peremptory challenges. 1/17/90 Tr. 31.

The transcript reflected the following explanations for the prosecutor's strikes against black jurors: (1) John Hill was struck because his daughter worked for the firm managed by defendants Joe and Skeeter; (2) Thermon Lawrence was struck because he was 71, apparently in ill health, and worked for a Navy contractor that performed cleaning contracts, a field then under investigation for fraud; (3) Gus Jackson was

struck because he was employed in the supply department at the Naval Air Station in Oceana, a department under active investigation for fraud at the time of trial, and because he had exhibited an unfriendly demeanor toward the government; (4) Pamela Elliot was struck because she had worked for a company that did work for the firm managed by Joe and Skeeter, because she was the youngest prospective juror, because she had dropped out of college, and because she was from Portsmouth, Joe's residence; (5) Fannie Perry was struck because she had an 11th grade education, because she was a single mother, and because she appeared angry when she looked toward the prosecutor during the jury selection process; (6) alternate Rosa Fitchett was struck because, at the time of trial, she worked for the Navy Supply Center, which had been the focus of fraud investigations for 15 years, and may have worked there at the same time as a co-conspirator in the case, and because she had displayed a friendly demeanor toward the defendants. Gov't C.A. Br. 9-15.

After the recess, the court listened to the defense arguments, reiterated its belief that the government's statement provided no evidence of racial discrimination, and agreed to defense counsels' request for supplementary argument on the issue the following morning. 1/17/90 Tr. 33-35. The next day, after extensive argument on the issue by counsel for Joe and Skeeter, the court denied the *Batson* motion, finding it to be "frivolous." 1/18/90 Tr. 27.

2. The court of appeals affirmed petitioner's conviction, but reversed and remanded as to Joe and Skeeter. The court held that because the district court had not made adequate factual determinations when it rejected the *Batson* claim, it was necessary to remand the cases of Joe and Skeeter for further proceedings. Pet. App. A45.

The court stated that the district court had departed from the "preferable" procedure under *Batson* in sev-

eral ways. First, the district court had not ruled on the question whether a prima facie case of discrimination existed before having the government state its reasons, and had not supported its acceptance of the government's reasons with findings of fact. Second, the court had instructed the government to state its reasons outside the presence of the court, thus depriving the trial judge of an opportunity to evaluate the prosecutor's credibility. Third, the court had deferred ruling on the *Batson* issue until after trial. Pet. App. A55-A56.

Although Joe and Skeeter urged the court of appeals to rule on the adequacy of the government's reasons on the basis of the existing record, the court determined that it was "not well positioned to conduct this important analysis with only a cold record and without the benefit of findings and supporting reasons of the trier of fact." Pet. App. A58. Accordingly, the court "remand[ed] the cases of Joe and Skeeter to the district court with instructions to conduct a *Batson* violation analysis." *Id.* at A59. The court did not remand as to petitioner, but affirmed his convictions.

3. After the time for filing a petition for rehearing in the court of appeals had expired, this Court issued its decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991), holding that a white defendant has standing to assert a *Batson* violation with respect to a prosecutor's exercise of peremptory challenges against black jurors. On remand of the case to the district court, petitioner requested that he be allowed to participate in the *Batson* hearing. The district court granted the motion, without determining whether petitioner could be granted any relief, and, on May 16, 1991, conducted the *Batson* hearing. To date, the court has not issued its ruling.

ARGUMENT

Petitioner contends (Pet. 14-17) that the court of appeals should have remanded his case, as well as

his co-defendants' cases, to the district court for a determination whether the government exercised its peremptory strikes against black jurors in a discriminatory fashion. He asserts that "[i]t must be assumed [that] the Fourth Circuit[,] based on its emphasis in its opinion that Joe and Skeeter are black and Baylor is white, did not believe Petitioner had standing, based on his race, to raise a *Batson* violation." Pet. 16. Whether or not petitioner's assumption about the court of appeals' decision is correct, he is not entitled to relief from this Court. Because petitioner forfeited his *Batson* claim by failing to raise it in the district court, the petition for a writ of certiorari should be denied.

In *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991), this Court held that a white defendant may raise a *Batson* challenge to the prosecutor's use of peremptory strikes against black jurors.[2] If the court of appeals had relied on the fact that petitioner is white in refusing to remand his case for a determination under *Batson*, that reliance would have constituted error. The court of appeals, however, did not state that it relied on that ground, and the court may well have reached the result it did because of the view that petitioner had not properly raised the *Batson* issue on appeal.[3]

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[2] *Powers* applies retroactively to petitioner's *Batson* claim because, under *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."

[3] The court of appeals initially characterized the *Batson* claim as "[t]he principal error assigned by defendants Joe and Skeeter" without mentioning any participation in that claim by petitioner. Pet. App. A44. Such an exclusion of petitioner from the *Batson* issue is consistent with the statement in the joint brief filed by petitioner and his co-defendants that "the district court's rubber stamp of the Government's explanations constitutes clear error, requiring a reversal of the convictions of *Joe and Skeeter* and a new trial." *Id.* at A38, quoting Pet. Jt. C.A. Br. 19 (emphasis added). On the other hand, the joint brief

But regardless of the ground for the court of appeals' ruling, this Court should not grant certiorari to have the court of appeals reexamine its ruling in light of *Powers*. Petitioner expressly declined to raise the *Batson* issue in the district court, and he appears to have done so for strategic reasons. Having deliberately waived the *Batson* issue in the district court, petitioner is not entitled to switch gears on appeal and join in that argument in order to enjoy a windfall remand based on his co-defendants' success.

It is well settled that a defendant may forfeit a *Batson* claim by failing to raise it timely in the district court. *Clark* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 90-2361 (4th Cir. June 19, 1991), slip op. 12 (noting that "[e]ven in criminal cases, the [*Batson*] objection is waived if not timely raised"); *Government of the Virgin Islands* v. *Forte*, 806 F.2d 73, 76 (3d Cir. 1986) (holding that "because Forte failed to make any [*Batson*] objection at the close of voir dire, he waived his present claim"); *United States* v. *Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), cert. denied, 481 U.S. 1004 (1987); see *Ford* v. *Georgia*, 111 S. Ct. 850, 857 (1990) ("Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected."). The considerations underlying waiver rules apply with special force when a defendant has deliberately withheld an objection at trial for tactical reasons. As this Court has noted in a related context, "default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not

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also included in its "statement of the issues presented for review" the question "[w]hether Joe, Skeeter, and [petitioner] are entitled to a new trial based on principles of [*Batson*]." Pet. App. A16, quoting Pet. Jt. C.A. Br. 19. Petitioner's separate brief also adopted the *Batson* argument of his co-defendants. Pet. App. A41. See Fed. R. App. P. 28(i).

personally waived that claim." *Murray* v. *Carrier*, 477 U.S. 478, 485 (1986). If the rule were otherwise, it would "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a * * * trial court with the intent to raise their constitutional claims in a[n appellate] court if their initial gamble does not pay off." *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977).[4]

The record is clear that petitioner waived the *Batson* issue in the district court. Petitioner makes no claim that he joined in the *Batson* issue at the trial stage, and in fact the record reflects that petitioner's trial counsel did not accept the court's invitation to join the *Batson* motion made by petitioner's co-defendants.[5] Nor did petitioner join in the lengthy *Batson* arguments made by counsel for Joe and Skeeter at the conclusion of trial. See 1/17/90 Tr. 7-38; 1/18/90 Tr. 3-27.[6]

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[4] Petitioner does not attempt to show that, under Fed. R. Crim. P. 52(b), his claim would amount to plain error "such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 16 (1985). Nor could any claim of plain error be sustained. After considering the government's reasons, the arguments of defense counsel, and the prosecutor's demeanor during the *Batson* hearing, the district court found the claim of discrimination to be frivolous. Although the court of appeals remanded for factual findings to facilitate appellate review, there is nothing in the record to suggest that any *Batson* violation occurred in this case, let alone that petitioner's substantial rights were violated.

[5] When the court met with counsel, late in the day of jury selection, to discuss the *Batson* issue, the court stated to petitioner's counsel: "Mr. Swain, do you want to join in? You are representing a white defendant. I don't know what you want to do." Petitioner's counsel replied: "I'm just hungry, Your Honor." 10/30/89 Tr. 239-240.

[6] The district court indicated its awareness that petitioner's counsel was not raising the *Batson* issue. At one point, the court stated to counsel for Joe that even though the court thought that the evidence of a *Batson* claim was "very, very flimsy," it

Statements made by petitioner's counsel earlier in the case shed light on why petitioner did not join in his co-defendants' *Batson* motion. The indictment charged petitioner with having engaged in a kickback conspiracy involving a company called Systems Management American Corporation (SMA), of which Joe and Skeeter were officers. In arguing for a severance of trial from Joe and Skeeter, petitioner bluntly stated that he had a strategy for jury selection that diverged from that of his black co-defendants; petitioner's aim was not to have blacks on the jury. Petitioner's counsel explained:

> MR. STANT: All right sir, Now, finally * * * you come to one that's hard to approach, but I think I have a duty to approach it. SMA was a minority company. SMA obviously has a community reputation one way or another. Mr. Shuttleworth and Mr. Lustig [counsel for Joe and Skeeter] are going to be very, very hopeful of having a lot of black jurors. My strategy would be not to have them.
>
> THE COURT: Well, I've given some thought to that, and nobody —
>
> MR. STANT: And, obviously, I'm going to be—to be prejudiced, because I'm only one and they're two.

7/20/89 Tr. 125. These statements suggest that petitioner's decision not to join in his co-defendants' *Batson* claim was purposeful: as a matter of trial strategy, petitioner, a white defendant, did not object to the removal of black jurors. Having elected to pursue that trial strategy in the district court, petitioner cannot change course on appeal and now assert that, under *Powers*, he may challenge his conviction by al-

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did not "blame you * * * Mr. Lustig, and Mr. Shuttleworth [counsel for Joe and Skeeter] one bit for asserting it." 1/17/90 Tr. 35.

leging that the equal protection rights of black jurors may have been violated.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45005

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[7] This is not a case in which it is necessary to accord standing to petitioner in order to ensure that someone is available to protect minority jurors against racial discrimination in jury selection. Cf. *Powers*, 111 S. Ct. at 1372-1373 (explaining that the third-party standing of white defendants to assert the equal protection rights of black jurors is justified in part because excluded jurors are unlikely to enforce their own claims). Here, Joe and Skeeter actively pursued the *Batson* issue at trial, on appeal, and on remand. Although, in our view, the record does not support any claim of discrimination by the government, that issue will be thoroughly aired and determined without granting petitioner's belated request to ride on Joe and Skeeter's coattails.

(3)

RECORD NO. 90-1858

Supreme Court, U.S.
FILED
SEP 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

JAMES E. BAYLOR, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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10

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred in failing to remand the case of the Petitioner, a white defendant, to the United States District Court for the Eastern District of Virginia ("District Court") based on a Batson violation when the Fourth Circuit, in the same appeal proceeding, remanded the cases of Petitioner's two Co-Defendants, who are black, to the District Court based on a Batson violation?

TABLE OF CONTENTS

Question Presented for Review . . . I

Petitioner's Response to the Government's Argument 1

Conclusion 7

TABLE OF AUTHORITIES

Batson v. Kentucky, 476 U.S. 79 (1986) I,1,2,3 4,5,6

Clark v. Newport News Shipbuilding and Dry Dock Company, No. 90-2361 (4th Cir. June 19, 1991) 3

Ford v. Georgia, 112 L.Ed.2d 935, 948-50 (1991) 3

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) 4,5

Mapp v. Ohio, 367 U.S. 643 (1961) 5

Powers v. Ohio, 111 S.Ct. 1364 (1991) 2,4

Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915, 927 (4th Cir. 1965) 5

United States v. Ferguson, 758 F.2d 843, 852 (2nd Cir.), cert. denied, 474 U.S. 841 (1985) 4

Wolf v. People of State of Colorado, 338 U.S. 25 (1949) . . . 5

PETITIONER'S RESPONSE TO THE GOVERNMENT'S ARGUMENT

The United States ("Government") acknowledges in its Brief in Opposition ("Government's Brief") that Petitioner raised the Batson[1] issue in the joint brief of Petitioner, Joe and Skeeter, and in Petitioner's Separate Brief to the Fourth Circuit. See Government's Brief p. 6-7, f.n. 3. The Government asserts as its sole ground for denying the Petition for Writ of Certiorari that Petitioner waived his Batson claim by failing to raise it in the District Court. See Government's Brief at p. 6.

The Government's claim that the Petitioner waived his Batson claim by failing to raise it in the District Court is not supported by the record or the law. The record reveals Petitioner did raise the Batson issue in the District Court. At the January 17, 1990 post-

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

trial hearing, counsel for Joe made several arguments for reversing the convictions of Joe, one of which was a very comprehensive and all inclusive Batson argument. See 1/17/90 Tr. 7-38. After Joe's counsel concluded his arguments, Petitioner's counsel was finally given the opportunity to argue on behalf of the Petitioner. Petitioner's counsel began his argument by making some brief opening remarks and expressly stated "I would also like to join in all the motions and arguments of co-counsel or counsel for Morgan Joe and adopt those where applicable to Mr. Baylor." 1/17/90 Tr. 132.

The Batson argument made by Joe's counsel is clearly applicable to Petitioner in light of this Court's decision in Powers v. Ohio, 111 S.Ct. 1364 (1991).[2] Accordingly, the

[2]In addition, on June 23, 1989 Petitioner filed a pre-trial Notice of Motion to join all other motions and arguments submitted by his co-defendants which were not inconsistent with the motions advanced by Petitioner.

issue was timely raised in the District Court.[3]

Assuming arguendo that Petitioner did not affirmatively preserve the Batson issue in the District Court for appeal, the Government's argument that Petitioner waived his Batson argument is also unsupported by the law. At the time the jury was sworn in this case (October 30, 1989) and at the time that the

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Accordingly, all the Batson arguments made by Petitioner's co-defendants, pre-trial and post-trial, should also be deemed to have been made by Petitioner.

[3]This Court has refused to set forth a specific time when a Batson objection must be made to be considered timely. See Batson, 476 U.S at 99-100; Ford v. Georgia, 112 L.Ed.2d 935, 948-950 (1991). Although the Fourth Circuit has recently held that a Batson objection is waived if not timely raised, Clark v. Newport News Shipbuilding and Dry Dock Company, No. 90-2361 (4th Cir. June 19, 1991); at the time Petitioner was tried in the District Court, the Fourth Circuit had not espoused any specific time for raising a Batson objection. Accordingly, even if Petitioner is deemed to have not raised the Batson issue until the post-trial hearing on January 17, 1991, his Batson objection should be deemed timely. See Ford v. Georgia, 112 L.Ed.2d at 948-950.

post-trial Batson arguments were made in the District Court (January 17, 1990 and January 18, 1990), this Court had not yet held, as it did in Powers v. Ohio, well over a year after Petitioner was sentenced by the District Court, that a white defendant in a criminal case has standing to raise the third party equal protection claims of black jurors precluded by the prosecution, through peremptory challenges, from serving on the petit jury solely on account of their race.

This Court has clearly stated that the standard to be applied by the federal courts in determining whether a waiver of constitutional rights has occurred, is whether there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see also, United States v. Ferguson, 758 F.2d. 843, 852 (2nd Cir.), cert. denied, 474 U.S. 841 (1985) (Courts do not look with favor on a waiver of constitutional rights and do not

presume acquiescence in the loss of fundamental rights; citing Johnson v. Zerbst); Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915, 927 (4th Cir. 1965) (Defendant's failure to object at trial to evidence admitted which was procured by a constitutionally impermissable search was not deemed waived. At the time of defendant's trial, the United States Supreme Court had not yet overruled its decision in Wolf v. People of State of Colorado, 338 U.S. 25 (1949) with its decision in Mapp v. Ohio, 367 U.S. 643 (1961). Accordingly, defendant did not know he had the right to object to the admissability of the evidence.)

Because at the time that the jury was sworn in the District Court and at the time the post-trial Batson arguments were made, Petitioner did not know that he had the right, privilege, or standing to raise a Batson objection, due to the fact that this Court had not yet held that a white defendant has the

right to make such an objection, Petitioner could not and did not waive that right.[4]

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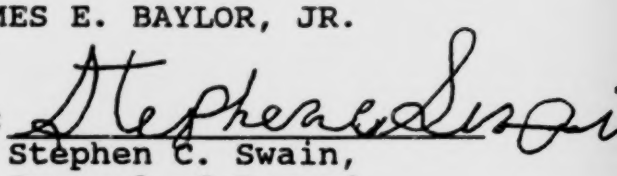
[4]Government argues that Petitioner intentionally failed to join in his Co-Defendants' Batson Motion because "he had a strategy for jury selection that diverged from that of his black Co-Defendants; Petitioner's aim was not to have blacks on the jury." Government's Brief, pg. 9. Although it is true that Petitioner's counsel argued for a severance at trial, in part on the basis that his strategy would be not to have black jurors on the jury, once the District Court denied Petitioner's Motion for Severance, his strategy changed. In fact, the District Court gave the Defendants a total of twelve peremptory strikes. After lengthy consultation among all of the defense attorneys, defense counsel collectively made the decision concerning which jurors to strike. See 1/30/89 Tr. 17, 223, 227-228. If Petitioner's strategy differed with his black co-defendant's strategy at the time the jury was being selected, it would have been impossible for all three co-defendants to make a joint decision concerning which jurors to strike.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES E. BAYLOR, JR.

By: 
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